

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

GOV 06042.10.3

Harvard College
Library

Gratis

Dunster House Papers
NO. 3
SEVENTY-FIVE CENTS

E 25
10

AN INTRODUCTION TO AMERICAN LAW

BY

ROSCOE POUND



DUNSTER HOUSE BOOKSHOP
26 HOLYOKE ST. & MOUNT AUBURN
Cambridge, Mass.

GOV 06042.10.3

Harvard College
Library

Gratis

Dunster House Papers
NO. 3
SEVENTY-FIVE CENTS

E—
10

AN INTRODUCTION TO AMERICAN LAW

BY

ROSCOE POUND



DUNSTER HOUSE BOOKSHOP
26 HOLYOKE ST. & MOUNT AUBURN
Cambridge, Mass.

AN INTRODUCTION

TO

AMERICAN LAW

An Outline of a Course Delivered at the Trade Union College under the Auspices of the Boston Central Labor Union Spring Term, 1919

BY

ROSCOE POUND

DEAN OF THE HARVARD LAW SCHOOL

DUNSTER HOUSE

CAMBRIDGE

Gov 6642.10.3

HARVARD COLLEGE
JUL 14 1938
LIBRARY

Copyright, 1919
by
Roscoe Pound

Reprinted 1920
Reprinted 1924

AN INTRODUCTION TO AMERICAN LAW

I

FUNDAMENTAL CONCEPTIONS

The Legal Order is an adjustment of human actions and relations in order to conserve the goods of existence, prevent friction in human use and enjoyment of these goods and eliminate waste of them.

It seeks to do this by securing as many interests as it may with the least sacrifice of other interests.

Scheme of the interests to be secured by law:

I. INDIVIDUAL INTERESTS.

1. Personality.
 - (*a*) *The physical person — the physical existence.*
 - (*b*) *Honor and reputation — the social existence.*
 - (*c*) *Belief and opinion — the spiritual existence.*

2. Domestic Relations.
 - (*a*) *Parental.*
 - (*b*) *Marital.*

3. Substance — the economic existence.
 - (*a*) *Property.*
 - (*b*) *Freedom of industry and contract.*
 - (*c*) *Promised advantages.*
 - (*d*) *Advantageous relations with others.*
 - i Contractual
 - ii Business
 - iii Official
 - iv Social
 - v Domestic
 - (*e*) *Free association with others.*

II. PUBLIC INTERESTS.

1. Interests of the State as a juristic person.
 (*a*) *Personality (existence and integrity).*
 (*b*) *Substance.*
2. Interests of the State as guardian of social interests.

III. SOCIAL INTERESTS.

1. General security.
 (*a*) *Safety.*
 (*b*) *Health.*
 (*c*) *Peace and order.*
 (*d*) *Security of acquisitions.*
 (*e*) *Security of transactions.*
2. Security of social institutions.
 (*a*) *Domestic.*
 (*b*) *Religious.*
 (*c*) *Political.*
3. General morals.
4. Conservation of social resources.
 (*a*) *Use and conservation of natural resources.*
 (*b*) *Protection and education of dependents and defectives.*
5. General progress.
 (*a*) *Economic progress.*
 i Stimulation of invention
 ii Free use of property
 iii Freedom of trade
 iv Freedom of industry
 (*b*) *Political progress.*
 i Free criticism
 ii Free political opinion
 (*c*) *Cultural progress.*
 i Free science
 ii Encouragement of arts and letters
 iii Encouragement of learning
6. The individual life.

In order to secure as many of these interests as may be, with as little sacrifice of other interests as may be, we seek to balance or compromise conflicting interests. For this purpose the law selects and recognizes certain interests within certain limits which it endeavors to fix as accurately as possible. The interests so recognized and delimited are secured by means of

Legal rights, Powers, Privileges — conferred on individuals.

Duties (absolute, relative), Liabilities—imposed on individuals.

A legal right is a capacity of influencing the action of others through the force of politically organized society. Corresponding to every legal right there is a legal duty. The person in whom the capacity of influencing others for the security of some interest is given, or in whom it is recognized, has a right; the person or persons upon whom that influence may be exerted, have legal duties.

A power is a capacity, conferred or recognized by law, of creating, divesting or altering rights and so creating or altering duties.

A privilege is an exemption from legal accountability for what, but for the privilege, would be a breach of duty.

A legal duty exists where one is bound to do or not to do something, because of some interest, individual, public or social, which the law undertakes to secure through the force of the state invoked in judicial proceedings. Legal duties are either absolute or relative. Absolute duties are imposed for the maintenance of social interests without regard to any corresponding individual (private) right. Relative duties are imposed in order to secure individual interests and in each case correspond to an individual (private) legal right. Absolute duties are enforced by the criminal law.

In order to secure individual interests the law may require people generally to conform to certain standards of conduct at their peril. If no interest of others is infringed by their departure from these standards nothing happens. If their departure from these standards results in injury, they must repair the injury by payment of damages. In such cases there is a liability — a condition where one incurs a risk of having to make reparation if he departs from a legal standard of conduct.

In addition to legal rights, we speak of natural rights and of political rights. By natural rights we mean, sometimes interest

which we feel ought to be secured by politically organized society, sometimes capacities of influencing the conduct of others through the force of politically organized society which we feel ought to exist in an ideal state. By political rights we mean powers or capacities of taking an active part in the government which the state recognizes in or concedes to certain classes of citizens. Ancient law did not distinguish legal rights from political rights. It allowed the former only to those who had the latter. In modern states we may say:

Natural rights belong to or reside in human beings.

Legal (or civil) rights belong to or reside in persons, who are either natural (human beings) or juristic (e.g., municipalities, corporations).

Political rights belong to citizens or to those upon whom the state has conferred a partial citizenship, but not necessarily to all of them. Thus women and children are citizens, but the former may or may not have certain political rights.

As the three categories are not necessarily identical, it follows that possession of one form of rights does not imply possession of the others. In modern times the law aims to accord legal (civil) rights to all natural persons to the extent of their moral or natural rights. The tendency is also to extend political rights as widely as possible. Ancient law limited and confused them. It conceded no legal rights to the foreigner. If the state gave him partial political rights, that fact gave him partial legal rights also. Today all human beings are legal persons, that is, have legal rights. Formerly this was not so.

Having conferred or recognized legal rights, powers and privileges, the law next has to provide means of making them effective. The means employed for this purpose are three:

1. Punishment.
2. Redress.
 - (*a*) Specific.
 - (*b*) Substitutional.
3. Prevention.

In administering these means, courts are governed by three sorts of legal precepts:

1. Rules, e.g., the rules as to what is a negotiable instrument, how it may be transferred and the effect of different modes of transfer; the rules as to when and what covenants will "run with the land;" the rules as to capacity for legal transactions.

2. Principles, that is authoritative premises for judicial and juristic deduction, to which we turn to supply new rules, to interpret old ones, to measure the scope and application of rules and standards, and to reconcile them when they conflict.

3. Standards, legally defined measures of conduct applied by or under the direction of the courts. E.g., the standard of due care or of the diligence of a reasonable man under the circumstances; the standard of reasonable service in the law of public utilities.

Bibliography. The zealous student who wishes to pursue the subject further should know of the following books:

Pollock, First Book of Jurisprudence, 4 ed. 1919.
Gray, The Nature and Sources of the Law, 1909.
Salmond, Jurisprudence, 4 ed. 1914.
Holland, Elements of Jurisprudence, 11 ed. 1910.
Austin, Jurisprudence, 5 ed. 1911.
Korkunov, General Theory of Law, 1909.
Maine, Ancient Law, new ed. by Pollock, 1906.
Maine, Early History of Institutions, 7 ed. 1897.
Carter, Law, Its Origin, Growth and Function, 1907.

Dicey, Lectures on the Relation between Law and Public Opinion in England, 2 ed. 1914.
Green, Principles of Political Obligation, 1911.
Brown The Underlying Principles of Modern Legislation, 1912.
Miller, Lectures on the Philosophy of Law, 1884.

II

HISTORY OF THE COMMON LAW

There are two chief legal traditions or systems of law, the Roman or Civil Law, and the English or Common Law. The Roman

Law, beginning as the law of the city of Rome, became the law of the Roman empire and thus of the ancient world, and eventually by being absorbed into the existing law, or received and replacing the existing law, from the twelfth to the eighteenth century, the law of modern continental Europe. It is now the foundation or a principal ingredient of the law in continental Europe, Scotland, Central and South America, Quebec and Louisiana, and all French, Spanish, Portuguese or Dutch colonies or countries settled by those peoples. The Common Law, having its roots in the Germanic law, or customary law of the Germanic peoples of western Europe, was developed by the English courts from the thirteenth to the nineteenth century and has spread over the world with the English race. It now prevails in England and Ireland; the United States except Louisiana; Canada except Quebec; India except over Hindus and Mohammedans as to inheritance and family law, and the principal British colonies except in South Africa.

Bibliography.

Jenks, Short History of English Law, 1912.

Holdsworth, History of English Law, 1903-1909.

Pollock and Maitland, History of English Law before the Time of Edward I, 2 ed. 1898.

Select Essays in Anglo-American Legal History, 1907-1909.

Pound, Readings on the History and System of the Common Law, 2 ed. 1913.

1

English Law Before the Conquest

Primitive law and modern law differ fundamentally with respect to the object they seek to attain. Modern law seeks for its immediate end the administration of justice. Primitive law seeks for its immediate end the preservation of the peace. Modern law seeks to satisfy the desire for justice; primitive law seeks to satisfy the desire for revenge. Hence primitive law aims only at restraining private war and preserving order. Modern law suppresses revenge; primitive law buys off revenge.

The Anglo-Saxon laws consist chiefly of elaborate tariffs of compositions for injuries, assessed not in proportion to the injury

done but in proportion to the desire for vengeance likely to be awakened.

Characteristics of primitive law:

(1) It was customary in origin and when written was a compilation of custom with amendments only where conflicting customs of different groups or localities were to be reconciled.

(2) It was chiefly traditional and preserved in the memory.

(3) It was formal to a high degree. This is the most striking and most universal characteristic of primitive law.

(4) It had but feebly developed sanction or executive power.

(5) It did not distinguish judicial from other functions.

(6) It was limited in scope, dealing mostly with violent wrongs to person and property.

(7) The kindred was the unit, not the individual human being as in modern law.

Tribunals in Anglo-Saxon law:

(1) The hundred court — an assembly of the freemen of the hundred, held monthly.

(2) The county court—an assembly of the freemen of the county, held twice yearly and presided over by the earl and the bishop.

These were open-air meetings, without records. The freemen who made up the court kept the law and their judgments in their memories.

Bibliography.

Thorpe, Ancient Laws and Institutes of England, 1840-1841.

Essays in Anglo-Saxon Law, 1876.

2

The Development of the Common Law

A. The King's Peace.

Modes by which the incipient state extended its authority:

(1) Restriction of the sphere of self-redress.

(2) Differentiation of classes of wrongs.

a. In some cases the law required composition to be accepted.

b. In some cases it added the sanction of outlawry to the feud.

c. In some cases it took the whole matter in hand.

(3) The truce or peace — an exemption of certain places or times or persons from the feud, so that neither the individual nor his kindred might do any violence without affront to the authority whose peace was infringed.

Outline of the truce or peace:

(1) The church peace.

(2) The house peace.

(3) The peace of public assemblies or places — the folk peace.

a. The *gemot.*

b. The gathering of the army.

c. The market.

d. The forest.

e. The festivals.

f. The walled town.

(4) The King's peace.

a. The King's person.

b. The King's presence.

c. The King's house.

d. The time of the King's coronation.

e. The King's servants (ministers) — extended to

i Persons specially taken under his protection.

ii Classes of persons taken under his protection.

f. Roads.

i The four great roads.

ii Roads from the King's city or borough.

iii Military roads.

iv All highways.

g. The chief waterways.

h. Absorption of other peaces.

Bibliography.

Pollock, Oxford Lectures (chap. iii, The King's Peace), 1890.

Howard, On the Development of the King's Peace and the Local Peace Magistracy, 1890.

B. The King's Writ.

When the king was applied to for justice or desired to vindicate his authority, he issued his writ to the sheriff or some other suitable person, directing what was to be done. The King's writ was used for all purposes connected with administration, the writs in judicial proceedings being in no way different from those in purely administrative affairs. Gradually a regular set of writs for judicial proceedings grew up, which in time became fixed in form and determined the scope and course of relief in the king's court.

Bibliography.

Bigelow, Placita Anglo-Normannica, 1881 (writs and legal proceedings from the time of William I to Richard I in the original Latin, with English summaries).

C. Church Law and State Law.

William the Conqueror ordained that the law of the church was not to be administered in the hundred courts as had been done before the Conquest. The precise province of ecclesiastical law became a subject of controversy in the twelfth century. The claims of the king as against the church are set forth in the Constitutions of Clarendon (1164). Ultimately the ecclesiastical courts had for the chief subjects of their jurisdiction matrimonial causes, testamentary causes and administration of estates. It will be noted that the two last have to do with personal property only. One result of this bit of history is to be seen in the separate probate courts which are usual in the United States.

Bibliography.

The Constitutions of Clarendon are translated in Henderson, Historical Documents of the Middle Ages, 11-16, 1892.

D. The King's Courts.

Original and derivative meanings of "court."

The "King's Court" meant at first the place where the king resided, attended by his chief officials and his household. It came to mean the center of administration where the business of government was carried on in all its branches, whether the king was actually there or not. As a chief part of the king's work came to be judicial, and came to be done in his name by justices appointed for

the purpose, the term came to mean a place where justice is administered judicially. This became the most important meaning. Soon after the reign of Henry II, the king's court began to split into departments, one having to do with breaches of the king's peace, and so with crimes and wrongs of every sort; one with the recovery of land and with the recovery of debts, regarded originally as a recovery of property, and one with the royal revenue. The first class of causes were said to be heard before the king in person and hence for a time such causes followed him about wherever war or administration might call him. The second were called "common pleas." Magna Charta (1215) provided: "Common pleas shall not follow our court but shall be holden in some place certain." This set off a distinct court which sat at Westminster. From the reign of Edward I there were three superior courts of common law, each sitting at Westminster, namely, the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer. Originally these courts had each a distinct jurisdiction, but in time they came to have concurrently a complete common-law jurisdiction.

Common-law judicial organization at the time of the American Revolution:

Courts of original jurisdiction:
- King's Bench.
- Common Pleas.
- Exchequer.

Courts of appellate jurisdiction (exercised at common law only by writ of error and examination of the parchment record of the lower tribunal to ascertain whether error of law was to be found therein):
- King's Bench.
- Exchequer Chamber.
- House of Lords.

Bibliography.

Carter, History of English Legal Institutions, 1902.

E. The Custom of the Realm.

When the king's courts came to administer justice over and for the whole kingdom they purported to administer a general customary law, the custom of the whole kingdom or the common cus-

tom or common law of England. But there was in fact no such general body of custom common to all England. The common law is a body of customary modes of decision, not a body of customary modes of popular action.

F. Precedents and Case Law.

England, because of the Norman Conquest, got a strong central tribunal with general jurisdiction before other countries. When this tribunal, or as it soon became, this set of tribunals, was established the reception of Roman law elsewhere had not gone far enough to impose that system upon England. Later when Roman law had been received elsewhere, England had a body of general law of her own strong enough to hold the ground. This was achieved through the practice of courts in following their past decisions in like cases, in looking to their past decisions for the principles to be applied as new situations called for decision, and in using their past decisions by way of analogy in developing the law. Elsewhere in Europe the Roman law came to be used for such purposes. In England the courts, called upon to administer a nonexistent common law of England, made such a law through regarding their past decisions as not merely decisions of the particular causes before the court but as solemn ascertainments of the law as well.

In the reign of Henry III Bracton, a justice of the common pleas, kept a note book of the judgments rendered which has come down to us as our earliest collection of precedents. Soon lawyers began to take down in court the arguments of counsel and the reasons given by the judges for their decisions, and we have a substantially unbroken line of these reports from the reign of Edward I to the present. In the 18th century reporting decisions became a regular business of certain numbers of the bar who devoted themselves to it, and there came to be a recognized series of reports for each court. In America the first reports are notes taken in court by eminent lawyers published by them or by others after their death. The states soon took the matter in hand, and in the case of all our courts of appellate jurisdiction, except the federal circuit courts of appeals, there are official reporters who are public officers and have for their duty to report judicial decisions for the information of the public.

In England and in America a point of law solemnly decided has become a part of the law and is held to bind the judges in other cases like it and to bind them to apply its principle where analogy must be resorted to. Our case law is not based simply upon the psychological law of association. It is not that the judges having done a thing once do it again from association of ideas and then many times from force of habit. It is based rather upon the conception that our courts must decide every case upon principles of the common law unless a statute governs, and hence must first ascertain and announce the rule of the common law which is applicable. When this rule or principle is thus ascertained by those who alone have the power to do so it binds the court and all courts inferior thereto, and is a persuasive authority of more or less weight, depending upon the standing of the court and the cogency of its reasoning, in all other common-law jurisdictions.

Knowledge that causes will be decided in the light of the judicial decision of like causes in the past enables the diligent lawyer to set before himself the exact materials from which the court will reach its decision in any particular case, to know exactly how the court will reason with respect to such materials, and thus to advise his client with confidence. No amount of legislative detail or precision can compare with this in producing certainty in the administration of justice.

Bibliography.

Maitland, Bracton's Note Book, 1887 (the introduction in vol. 1 will be useful. The body of the work is the Latin text of Bracton's notes).

Dillon, Laws and Jurisprudence of England and America, 1894. (Lectures 8-10).

G. The Jury.

One of the chief factors in turning the ordinary course of litigation from the local courts into the king's courts, and thus in establishing our common-law system, was the superiority of the mode of trial employed in the king's courts.

As the purpose of primitive law is chiefly to keep the peace, and as discussion or argument would tend in primitive times to provoke rather than to prevent violations of the peace, primitive law re-

sorts to crude mechanical devices in order to determine the issues upon which decision must depend. The mode of trial is never in the form of investigation of the facts. It is an arbitrary, mechanical device, usually predicated upon the idea of obtaining the judgment of God by resort to some test or ordeal.

Modes of trial in the old English law:

1. Compurgation.
2. Witnesses
3. Charters
4. Record
5. Ordeal
 - *a.* Cold water
 - *b.* Hot water
 - *c.* Hot iron
 - *d.* The morsel
6. Battle (brought into England by the Normans).

To these crude archaic modes of trial the king's courts added trial by jury which became the normal mode of trial and developed gradually into a rational method of ascertaining disputed questions of fact. The jury had its origin in the inquisition or inquest, an administrative proceeding employed by the Frankish kings in matters of revenue and borrowed by them from a similar practice of Roman governors of provinces. The Frankish king, desiring to know the revenue which a locality should pay, sent for certain citizens thereof and required them to state the facts under oath. This system was borrowed by the Norman dukes and was brought into England at the Conquest. At first it was used for all purposes for which the king might require to know facts within the knowledge of the free men of a particular locality. The legal genius of Henry II made it into a judicial institution.

In its earliest form trial by jury was a mechanical mode of trial. The jurors stated in their verdict what they knew, not from evidence heard, but from personal knowledge and the repute of the neighborhood. By a gradual course of evolution extending over several centuries juries ceased to be witnesses and became purely triers.

Next to our common-law doctrine of precedent the jury has made our legal system what it is.

Bibliography.

Bigelow, History of Procedure in England, 1880 (chapter 9 describes the old modes of trial).

Thayer, Preliminary Treatise on Evidence at the Common Law, 1898 (part I, Development of Trial by Jury).

Haskins, Norman Institutions, 1918 (chap. 6, The Early Norman Jury).

H. The Supremacy of Law.

In the Middle Ages law was thought of as something superior and anterior to the state. In the 17th century this doctrine led to a serious controversy between the common-law courts and the Stuart kings, as a result of which the power of the courts to judge of the legality of executive acts became thoroughly established. The great common-law lawyers of that period claimed a like power with respect to the validity of legislative acts. As a result of the English revolution of 1688 Parliament became supreme. In America, where courts had been required to pass upon the validity of colonial legislation with respect to colonial charters, the idea was familiar at the time our constitutions were adopted, and for that and other reasons passed into our constitutional law.

At the common law every public official is under the same liability for acts done without legal justification as any other person, and the liability is enforced in the same courts. If a public officer exceeds his authority, and in so doing does injury to another, his wrong is looked upon the same as a wrong committed by anyone else, and is dealt with by an ordinary action in the ordinary courts. This doctrine is peculiarly one of Anglo-American law. In Roman law countries administrative acts are examined into in distinct administrative tribunals.

Establishment of the doctrine of the supremacy of law was the last achievement of the common law as a system administered in the king's courts of law. That system culminates with the establishment of this doctrine in the 17th century.

Bibliography.

Dicey, Law of the Constitution, 8 ed. 1915 (Part II, The Rule of Law).

Thayer, Legal Essays, 1898 (Essay I, The Origin and Scope of the American Doctrine of Constitutional Law).
Coxe, Judicial Power and Unconstitutional Legislation, 1893.
McLaughlin, The Courts, the Constitution and Parties, 1912 (I, The Power of a Court to Declare a Law Unconstitutional.)
Haines, The American Doctrine of Judicial Supremacy, 1914.

3

The Development of Equity

In all systems of law there come periods of rigidity in which rules are so hard and fast that they cease to bring about just results. In such periods growth must take place in some manner or the legal system will fail. According to the famous generalization of Sir Henry Maine the agencies of such growth are three: fictions, equity, legislation.

Equity in England developed out of the king's residuary power to do justice among his subjects — that is, that part of his prerogative of administering justice which remained after the development of the common-law courts and the transfer to them, as his delegates, of his power of administering justice in ordinary cases. The Chancellor, as the king's secretary, as it were, came to exercise this residuary jurisdiction.

Six circumstances operated to require the intervention of the Chancellor in certain classes of cases, and so to create a court of equity and a system of equity. These are the clew to differences between law and equity.

1. The formal character of the rules of the common law as to property in land which made gross frauds and breaches of trust possible, since the court of law recognized only the holder of the formal legal title.

2. Rigidity of the system of writs and actions which could be developed only within narrow lines and left many situations unprovided for.

3. A court of law could not command a defendant to do anything specifically. So, for example, a wrong-doer could compel the owner to sell a unique chattel for what the jury chose to assess as damages in an action of trover.

4. A court of law because of its mode of trial (by jury) could not deal with any but two-sided cases. There must be one party on each side and only two sides, or else the parties on each side must have a joint interest so that they could all be treated as one.

5. A court of law had only contentious jurisdiction. It had no preventive jurisdiction. At common law substantially the only preventive remedy is binding over to keep the peace.

6. A court of law had no power to make a conditional judgment and no power to mould relief to the circumstances of particular cases. It could only render a fixed form of judgment.

Equity consists of that part of our legal system which developed in the court of chancery and its analogues in America. The court of chancery did not have any special field set off to it as in the case of admiralty or probate. The Chancellor interfered more or less over nearly the whole domain of individual rights. Hence to treat adequately almost any subject in our legal system it is necessary to learn both the legal and the equitable doctrines and remedies relating thereto. Thus the law of property is supplemented by the doctrines of equity as to trusts and equitable servitudes; the law of contracts by the doctrines of equity as to specific performance and accounting; the law of torts by doctrines of equity as to equitable waste and by doctrines as to prevention of torts; the common law of mortgages by the equitable doctrines as to redemption; the law of quasi-contract by the equitable doctrines as to constructive trust, etc.

Such a dual system is not inherently necessary. Conceivably all the rules which make up a legal system might have been developed and applied in one set of courts, and all the rules on any subject might form one body of doctrine. That is true everywhere in the world except in English-speaking countries.

Bibliography.

Maitland, Lectures on Equity, 1909.

Kerly, Historical Sketch of the Equitable Jurisdiction of the Court of Chancery, 1890.

Spence, History of the Equitable Jurisdiction of the Court of Chancery, 1846-1849.

For an outline of equity as administered in the United States the student may be referred to:

Bispham, Principles of Equity, 9 ed. 1915.

Pomeroy, Equity Jurisprudence, students' ed. 1907.

4

The Law Merchant

The custom of merchants was a general body of commercial usage observed by merchants throughout western Europe. The merchant of the Middle Ages was in a class by himself. The ordinary law was not applied between merchant and merchant, but as he was usually itinerant and a foreigner, special tribunals existed to determine his controversies. This custom of merchants was treated in the common-law courts as a fact to be ascertained by the evidence of merchants, that is, by expert evidence in every particular controversy. In the 18th century the growth of trade and commerce rendered continuance of such a condition of commercial law impossible. The judges had recourse to the common-law doctrine of binding precedents; they held that it was for the court to determine what was the custom of merchants, and having so determined on any point, the court's decision became a precedent to be followed in like cases and to be developed by analogy. Thus the custom of merchants was converted into a custom of decision in mercantile causes, founded, however, upon the former in that the courts had become familiar therewith and embodied its chief features in the new judicial law merchant.

The chief subjects which represent the law merchant in our law today are negotiable instruments and insurance.

Bibliography.

See Select Essays in Anglo-American Legal History, vol. 3, Essays 47-58.

5

The Legislative Reform Movement

Modernization of the common-law legal system, begun by the court of chancery and carried on by the law merchant, was completed by the legislative reform movement which may be said roughly to cover the period from 1776 to 1875. In the last quarter

of the 19th century, although legislation was still active in all common-law jurisdictions, it ceased to be directed to sweeping and far-reaching changes. The tendency became one to codify and restate rather than to alter. More recently demand for social legislation has begun to produce statutes making profound changes in common-law rules and doctrines. This tendency perhaps indicates that a new period is at hand, but has not progressed far enough to enable us to say more.

Bibliography.

Select Essays in Anglo-American Legal History, vol. 1, Essays 14-18.

A Century of Law Reform, 1902.

Atkinson, Jeremy Bentham, 1905.

III

THE COMMON LAW IN AMERICA

When settlers go into a new country which is without law, in legal theory they carry their own law with them. Thus the common-law system became established in British America. It is also a settled principle that when political sovereignty is changed the law remains unchanged and can only be altered by legislative adoption of judicial reception of some other system. Hence the throwing off of British sovereignty at the Revolution left the English law in force in America, just as Spanish law is now in force in Porto Rico and in the Philippines. But there was no desire on the part of the colonies in declaring their independence of British sovereignty to throw off English law. The Declaration of Rights of the Continental Congress in 1774 solemnly declared "that the respective colonies are entitled to the common law of England."

In fact the reception of the common law in this country came later than the legal theory would indicate. Until the middle of the 18th century justice was administered by executive officers or by legislative assemblies governed by little or no law. Courts manned by trained judges and a trained legal profession became usual in the last half of the 18th century, but it was not until some time after the Revolution that courts ceased to be made up largely of untrained magistrates endeavoring to administer justice accord-

ing to their common sense and the light of nature. After the Revolution there was some opposition to English law on account of general antipathy toward English institutions growing out of the war. Economic development soon compelled a regular judicial organization with trained judges and a trained legal profession, and the common law which theoretically had been in force in this country from the beginning definitely established itself as the law of America.

Bibliography.

Warren, History of the American Bar, 1911.

In addition to Select Essays in Anglo-American Legal History, vol. 1, Essays 11-13 and vol. 2, Essays 45, 46, see Two Centuries' Growth of American Law, 1901.

IV

SOURCES AND FORMS OF LAW

1

Sources and Forms in General

"Sources of law" may be used to designate the methods and agencies by which legal rules, principles and standards are formulated. "Forms of law" may be used to designate the modes in which these rules, principles and standards are authoritatively expressed.

Laws derive their legal authority from the state. But only a small part of the rules and principles that make up a body of law are formulated by the state directly.

Sources or formulating agencies:

(1) Usage. The legislature, or, as in the case of the law merchant, the courts may take up a matter of usage and make it law.

(2) Religion. This was a formulating agency of the first importance in primitive law. In modern law, the broad principles and fundamental conceptions with which religion has to do have long been settled and this source is no longer active.

(3) Adjudication. In our legal system, adjudged cases are a form of law. But in any system adjudication formulates rules and principles which get authority in another form. For example,

the rules codified in the Negotiable Instruments Law or the Sales Act.

(4) Scientific discussion by commentators and text writers. In our law such discussions have no direct or intrinsic authority. But so far as the criticisms of writers and commentators are well taken, so far as their deductions are in accord with sound legal reason and so far as the propositions they advance afford adequate solutions of pressing problems, they commend themselves to courts or legislatures and are given authoritative form.

(5) The general moral sense of the community.

(6) Legislation.

In the common-law system, there are three forms of law:

1. Legislation, of which, using the term in the wider sense, there are three varieties in the United States: Constitutions, Federal treaties, Federal and State statutes.

2. Judicial decisions.

3. Books of authority.

A. Legislation.

Blackstone's rules for the construction of statutes:

"1. There are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy, that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. . . .

"2. A statute which treats of things or persons of an inferior rank cannot by any general words be extended to those of a superior. . . .

"3. Penal statutes must be construed strictly. . . .

"4. Statutes against frauds are to be liberally and beneficially expounded. . . .

"5. One part of a statute must be so construed by another that the whole may, if possible, stand. . . .

"6. A saving totally repugnant to the body of the act is void. . .

"7. Where the common law and a statute differ, the common

law gives place to the statute; and an old statute gives place to a new one. . . .

"8. If a statute that repeals another is itself repealed afterwards, the first statute is hereby revived without any formal words for that purpose. . . .

"9. Acts of parliament derogatory from the power of subsequent parliaments bind not. . . .

"10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . ."

B. Judicial Decisions.

All tribunals inferior to and whose decisions are subject to review by a court of appellate jurisdiction which has decided a point of law, are bound absolutely by the decision. They have the duty of applying the point to all cases involving it whether they approve or not. The court itself will also follow the decision, and will apply its principle by analogy in other cases as a general rule. Yet if the point has been decided but once and the court feels the decision, as Blackstone puts it, to be "flatly absurd and unjust" it will, although cautiously, overrule the prior decision of the point. Some courts will so overrule a line of prior decisions. But as a rule, when a question has been decided often in a certain way, and has thus become settled by repeated decisions, courts will leave it to the legislature to make a change. If the decision lays down a rule of property the courts will not overrule it since titles and vested property rights might be interfered with thereby. If it has to do with a rule of commercial law where uniformity with other states is often as important as a uniform course of decision within the state, a prior decision considered to be wrong will be overruled more readily. If it has to do with a matter of procedure the courts are even more free to change their view, since the substance of rights will not be disturbed.

In jurisdictions other than the one in which the decision was rendered, or in courts of co-ordinate authority it is said to be "persuasive" but not controlling. It must commend itself to the

court in which it is cited as correct in reasoning and in accord with the principles of the common law. Usually, if only for the sake of certainty, a well-considered decision will be followed elsewhere. If there is a long and settled line of adjudications in coordinate jurisdiction to a certain effect the court in which the question arises for the first time will feel bound to yield its personal judgment thereto unless in an extreme case, for such a line of decisions may be taken to show the common law. Yet there may be good reason for reaching an independent conclusion in such a case, and hence courts often differ so that there come to be two or more divergent lines of authority on many subjects.

C. Books of Authority.

There are few books of authority in our legal system, that is, text books, commentaries, or juristic discussions which have the authority of law in or of themselves. In other systems of law such books are often numerous and of the greatest weight. With us, as a general rule, such a book has no authority of itself, and is regarded only to the extent that it expounds accurately the judicial decisions which it cites, and deduces correctly the principles of law to be derived from such decisions.

We have a few books which are truly books of authority: A treatise on tenures by Sir Thomas Littleton, Justice of the Court of Common Pleas, in the reign of Edward IV, which is an absolute authority on questions of real property; the writings of Sir Edward Coke, usually called Lord Coke, who was Attorney-General under Elizabeth and Lord Chief Justice under James I, whose commentary upon Littleton especially is regarded as an authoritative statement of the common law of the classical period in which he practised, judged and wrote.

Bibliography.

Black, Judicial Precedents, 1912.

Sedgwick, Construction of Constitutional and Statutory Law, 1874.

Black, Interpretation of Laws, 2 ed. 1911.

2

Forms of the Common Law in America

Seven elements go to make up the common law in the United States:

(1) The decisions of the old English courts. In some states only decisions prior to colonization, that is, prior to the reign of James I, are authoritative, and those between the reign of James I and the Revolution are only persuasive as to what is the common law. In other states English decisions prior to the Revolution are authoritative. In others, particularly western states, where statutory adoption of the common law is relatively recent, it is held the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case the courts consider subsequent decisions, either in England or America, better expositions of the Anglo-American legal system. But to be part of our common law, the rules and principles which these decisions establish must be applicable to the social, economic and physical conditions in America.

(2) American judicial decisions since the Revolution.

(3) Judicial decisions in England and the other common-law countries since the Revolution.

(4) The Law merchant, so far as it was not already incorporated in the common law at the Revolution.

(5) The canon law (law of the church in the Middle Ages), so far as it was received in the English ecclesiastical courts, which had jurisdiction over probate and divorce, and entered into our law in the form of traditions of practice and of decisions of the ecclesiastical courts in probate and divorce causes.

(6) International law, to the extent that it is a common element in the laws of all civilized states.

(7) English statutes prior to the Revolution, so far as applicable to conditions in America, in furtherance, development or amendment of the common law. All such statutes prior to colonization are part of our common law. But, as the colonies had their own legislatures and all English statutes after colonization were not enacted for America, English statutes after colonization and before the Revolution may or may not be part of our common law, according as they were or were not received in America as such.

V

SYSTEM OF THE COMMON LAW

Bibliography: The best systematic work in short compass is Terry, Leading Principles of Anglo-American Law, 1884. The classical institutional books are, Blackstone, Commentaries on the Laws of England (1765) and Kent, Commentaries on American Law (1826-1830). For Blackstone, Lewis's edition (1897) and Jones's edition (1915-1916), and for Kent the 12th edition by Holmes (1873) and 14th edition by Gould (1896) may be recommended. The student should also know of Holmes, The Common Law (1881).

1

Rights

Some legal rights are available generally against everyone, as, for example, rights of ownership. Other legal rights are available against definite persons only, as, for example, the right of a creditor to exact payment from his debtor. The former are called rights *in rem*. The latter are called rights *in personam*.

SCHEME OF RIGHTS IN ANGLO-AMERICAN LAW

I. In Rem.

1. Personal integrity. The right not to be injured in body or mind by the culpable action of others. This extends to —

a. Life.
b. Body.
c. Health.
i Bodily.
ii Mental.

Originally the taking of life did not give rise to any civil liability. Modern legislation has given an action to the successors or the estate of the person killed. Does this right extend to one's peace of mind and sensibilities so far as to protect against annoying, humiliating or distressing invasions of privacy? This is in dispute.

2. Personal liberty. The right of free motion and locomotion except as restricted by law and restrained lawfully by the proper officers acting in the proper manner.

3. Society and control of family and dependents.
4. Private property.
5. General substance.
 a. Reputation.
 b. Advantageous relations with others.
 c. Undiminished substance as against fraud and aggression.

II. In Personam.

1. Contractual. Rights arising independently of pre-existing rights, out of the agreement of the parties.

2. Quasi-contractual. Rights to have restitution or compensation for a benefit conferred, imposed by law in order to prevent unjust enrichment of one party at the expense of another.

3. Fiduciary. Rights to have a trust or confidence executed specifically. These rights are recognized only in courts of equity or in proceedings in equity.

4. Delictual. Rights to compensation arising from violations of pre-existing rights *in rem*.

2

Persons

Bibliography. The student may be referred to Tiffany, Persons and Domestic Relations, 2 ed. 1909; Peck, Law of Persons and Domestic Relations, 1913.

By persons, in law, we mean those entities which the law clothes with the capacity of exercising a legal control over or influence upon the acts of others. Persons are of two classes, natural persons and juristic persons. In modern law, every human being is recognized as a natural person; and hence as a legal person, since modern law allows a legal personality to every natural person. Juristic persons are aggregates or groups of natural persons or aggregates of rights or even of objects, which for convenience in certain relations or for certain purposes, the law treats as subjects of certain rights and hence as persons. The most important form is the corporation, which may be (a) public — for example, municipalities, such as cities and towns; (b) private, including public service companies, such as railway companies, and ordinary business companies.

Legal existence begins with birth and ends with death which

may be either natural or civil. At common law there was civil death if a person was banished or abjured the realm by the process of the common law, or "entered into religion," that is, went into a monastery and became there a monk professed. In several states there are statutes providing that persons adjudged to imprisonment for life shall be civilly dead. Otherwise civil death is obsolete.

Complete loss of legal personality must be distinguished from mere incapacity. A person may have legal rights and yet be incapable of performing legally valid acts, or incapable of incurring legal liability, or incapable of incurring responsibility for what would otherwise be accounted violations of absolute duties. A person who is civilly dead has lost his legal identity; the old legal personality is extinct and there is either a new one or none at all in its place. But a person whose legal personality is unaffected may have lost, or may not have attained legal capacity to act in some or in all cases. Accordingly the law distinguishes between persons of full and complete capacity and persons of partial or limited capacity. Ancient law conceded full capacity to comparatively few. Modern law aims to confer full legal capacity as widely as possible, and in general to create legal incapacities only where there are natural incapacities also. The only substantial exception in modern law is that for historical reasons married women are still under a partial legal incapacity in many jurisdictions. In such jurisdictions they have only a limited power of contracting. With this exception the legal incapacities recognized in modern law coincide substantially with natural incapacites. In the Anglo-Amercan legal system there are now five conditions which create legal incapacity, total or partial: (1) Infancy or minority; (2) Coverture, that is, the condition of being a married woman; (3) Idiocy and lunacy or insanity; (4) Conviction of treason or felony; (5) Alienage.

3

Things

The first element of a legal right may be said to be a person in whom the right resides, or upon whom the law has conferred it. The second element is an object with respect to which it exists

and is exercised. The object may be the personality of the person in whom the right resides, or it may be some external object related to his economic existence with respect to which his interests of substance are secured.

External objects with respect to which individual human beings may make claims are either subject to ownership or not subject to ownership. The social interest in the use and conservation of social resources precludes individual ownership of certain things such as light and air and running water. The water of running streams may be used, but may not be owned. At common law the owner of the land over or beside which the water of a natural stream runs is said to have "a natural right" appurtenant to his land to use the water so far as such use is consistent with a like use by all other owners similarly situated. In countries governed by the Roman Law rights to use the water are granted by the state from time to time. In the arid states of the western portion of the United States rights to use the water may be acquired by prior appropriation.

Things subject to ownership are either corporeal or incorporeal. Under the latter head are included such things as patents, copyrights, and legal claims against other persons, as, for instance, bills and notes, book accounts and shares of stock.

4

Acquisition and Loss of Rights

A. Acts.

Jurists distinguish between events and acts. By events they mean those occurrences which take place independent of human will. By acts they mean those which are subject to the control of the human will and so flow therefrom. Thus acts are exertions of the will manifested in the external world. Acts may have legal consequences because they interfere with interests (social, public or private) recognized and protected by law, and so involve responsibility for breach of an absolute duty or liability for breach of a duty correlative to some right. They may also have legal consequences because so carried out as to depart from the legal standard of conduct under the circumstances, and thus involve liability. In such cases we must ask, has the person in question capacity for responsibility or for liability? In general the com-

mon law holds one to liability for infringement of a private right where it would not hold him to responsibility for breach of an absolute duty, as in case of an insane person who may be held for a tort (infringement of an individual right *in rem*) but not for a crime.

B. Legal Transactions.

Acts may also have legal consequences because such was the intentions of the person or persons who performed them and the law recognizes and gives effect to that intention. Such acts are called legal transactions. They are performed in order to create rights, powers or privileges, and when done by competent persons and in the prescribed manner, the law recognizes them and carries out the intent. Examples are conveyances of property and transfers of rights; contracts; declaration of trusts. In general capacity for legal transactions is limited much more than capacity for responsibility. Thus an infant over seven years of age may be responsible, and a minor over fourteen but less than twenty-one years of age will be responsible, if no other defect exists, for breach of an absolute duty. Yet, on the one hand, the infant may be liable for torts, and, on the other hand, a minor (under 21) is not bound by legal transactions. In general it may be said capacity for rights requires personality; capacity for acts, will; capacity for legal transactions, will and judgment.

Acts intended as legal transactions may be valid, that is, they may be such that the law gives them the effect intended, or they may be void or voidable. If void they have no legal effect at all. If voidable they have legal effect unless and until challenged, but they may be attacked for some defect, and if so they will fail to produce the intended legal consequences. Acts intended as legal transactions are void where not done in the manner which the law prescribes, or where they seek some end which the law refuses to recognize as legitimate, or where they involve injury to some interest, social or public, which the law regards as more important than the general interest in carrying out the intention of those who perform them. They are voidable chiefly where there is some defect in the capacity of the person acting, or where the intention to which the law is asked to give effect is not formed freely or intelligently or under circumstances which make it fair to hold the party

thereto. If one was forced or defrauded into a transaction or entered into it by mistake, there is ground for attacking it as being voidable. Almost all legal transactions in modern times may be performed through a representative who is legally called an agent.

On agency the student may be referred to
Huffcut, Law of Agency, 2 ed. 1901.
Mechem, Law of Agency, 2 ed. 1914.

5

Exercise and Protection of Rights

A. Self Help.

In primitive law primarily the injured individual must help himself. It was only exceptionally that he could invoke the aid of public tribunals. For the most part the law limited and regulated self redress, and the judgments of a court originally simply gave to the complaining party the permission of the law to take what was found to be his due. In modern law self help and self redress are narrowly limited. At common law there were six cases where self help was allowable, but some of these are obsolete and others have been much limited.

Self Help and Self Redress at Common Law:

1. Self defence — the defence of one's person and of others standing in the relation of husband and wife, parent and child, or master and servant. In these cases if the person himself or one in any of these relations toward him is forcibly attacked in his person or possession, it is lawful to repel force by force.

2. Recaption. When anyone has deprived another of possession of his goods or chattels or wrongfully detains his wife, child, or servant, the owner, the husband, the parent or the master at common law might lawfully claim and retake them wherever he happened to find them, provided it was not done in a riotous manner or attended with a breach of the peace. With respect to the relation of master and servant this rule goes back to the days of apprentices when the relation of master and apprentice was analogous to that of parent and child.

3. Entry upon land in case of disseisin. At common law an owner who had been put out of possession of land by a disseisor

had a power of entering upon the land and regaining his seisin. The entry must be peaceable and without force.

4. Abatement of nuisances. Where one person unlawfully obstructs a right of way or interferes with some right appurtenant to another's land or maintains upon his own land something which is or threatens a continuing injury to the public health, safety, or morals, and is specially and peculiarly injurious to another, the latter may take away or remove or abate the nuisance provided he commits no breach of the peace in doing it.

5. Distress. This may be distress of cattle damage feasant, or distress for rent. In the former case a person in possession of land may seize cattle doing damage by trespassing upon the land and hold them as security for payment of the damage. In the latter case a landlord may seize the goods brought by the tenant upon the land and hold them as security for the non-payment of rent, or non-performance of duties owing by the tenant to the landlord. Distress of cattle damage feasant has been modified or regulated by statutes in many jurisdictions, but is generally permitted. Distress for rent has been greatly modified or abolished by statute in most American jurisdictions.

6. Seizure of heriots. At common law at the death of a tenant in certain cases the landlord was entitled to certain of the goods left by the tenant and he might seize the identical thing to which he was entitled in order to maintain his right. This species of self help was never obtained in the United States.

B. Organization and Jurisdiction of Courts.

Bibliography.

The student may be referred to Baldwin, The American Judiciary, 1905.

A court is said to be "a place wherein justice is judicially administered." It is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law. It must sit at the place designated by law, and the persons authorized to administer justice must be at that place for the purpose of administering justice at such times as may be designated by law. The times fixed by law for the transaction of judicial business are called "terms." In this country in most

jurisdictions the terms of court are provided for by statute. In a few jurisdictions terms have been done away with, and the courts are open at all times.

With respect to the scope of their jurisdiction courts are (1) of general jurisdiction, or (2) of special or limited jurisdiction. The former are usually called superior courts, the name borne by the three common-law courts to which they are analogous. Courts are also (1) of original jurisdiction, or (2) of appellate jurisdiction. A court's jurisdiction is original when causes, or a certain class of causes, are brought there in the first instance; it is appellate when, having originated in some other court, causes are brought to the court in question to obtain review of the order or judgment entered. Courts are often given both kinds of jurisdiction. Thus the Supreme Court of the United States has original jurisdiction of controversies between states of the Union, though its jurisdiction is chiefly appellate.

Jurisdiction may be also (1) exclusive, or (2) concurrent. The jurisdiction of a court is exclusive when controversies or a class of controversies must be taken before the court in question and nowhere else. It is concurrent when they may be taken before the court in question or some other tribunal at the choice of the plaintiff. Thus the United States District Court and the superior courts of general jurisdiction in each state have concurrent jurisdiction of actions at law or suits in equity in which a federal question is involved or there is a diversity of citizenship, that is, where the parties on one side are residents of the state and those on the other side residents of some other state or states. The United States District courts, on the other hand, have exclusive jurisdiction in bankruptcy.

In order to determine a cause a court must have jurisdiction (1) of the subject matter, (2) of the person against whom, or thing with respect to which, it renders judgment or makes an order. Jurisdiction of the subject matter means power to entertain the kind of proceeding which is brought before the court. This is determined by law. Jurisdiction of the person is obtained by service of process, that is, by reading to, or delivering to the person, or today, by leaving at his residence, a writ in the name of the sovereign commanding his appearance in court. If the pro-

ceeding is directed not against the person but against property, the court acquires jurisdiction over the property by seizing the property, or by publication of notice under the provisions of statutes.

C. Actions.

So much of substantive law is, for historical reasons, bound up in procedure that it is highly important for the student to become acquainted at once with the more important common-law actions. Although these actions are now superseded by more simple and flexible forms of procedure, they have given rise to, or correspond to, important distinctions in the substance of the law, which are still of daily application.

The principal common-law actions are ten: (1) Ejectment, (2) Detinue, (3) Replevin, (4) Debt, (5) Covenant, (6) Special *Assumpsit*, (7) General (*Indebitatus*) *Assumpsit*, (8) Trespass, (9) Trespass on the Case (Case), (10) Trover. This is the final form of these actions, after they had developed into a logical system. Historically, Ejectment, *Assumpsit*, Case and Trover were developments out of Trespass, and *Assumpsit* and Trover were in form to the end actions of Trespass on the Case.

Scheme of the Common-Law Actions.

1. To recover property.
 To recover real property — Real Actions.
 The real actions are obsolete, except that the Writ of Entry is in use in Massachusetts, New Hampshire and Maine.
2. To recover possession —
 Of real property — Ejectment.
 Of personal property —
 acquired lawfully by the defendant, but subject to a superior right of immediate possession in the plaintiff — Detinue.
 taken by the defendant from the plaintiff — Replevin.

 Replevin, in this country, has almost entirely superseded detinue, and generally lies in all cases to recover possession of personal property.

3. To recover damages.

(1) *Ex contractu.*

To recover a liquidated sum of money, due upon specialty, record, statute, or simple contract — Debt.

To recover damages for breach of a covenant, of promise under seal — Covenant.

To recover damages for breach of a simple contract — (Special) Assumpsit.

To recover damages upon *Quasi Contract* (no promise, but the case dealt with in law as if there had been one) — (General) Assumpsit.

(2) *Ex delicto.*

To recover damages for a direct physical interference with the person or property — Trespass.

Where the trespass consists in taking chattel property out of the plaintiff's possession, the action is called Trespass *de bonis asportatis*, or Trespass *de bonis.*

Where the trespass is committed upon real property, the action is called Trespass *quare clausum fregit*, or Trespass *quare clausum.*

To recover damages for wrongful acts not within the scope of other actions (and not breaches of contract) which cause injury, without direct physical interference with person or property (e. g., Libel, Slander, a Nuisance, Deceit) — Case.

To recover damages for the conversion of chattels — Trover.

Bibliography.

Maitland, Lectures on the Forms of Action at Common Law, 1909. Published with his lectures on equity.

Stephen, Principles of pleading, ed. by Williston, 1895.

Hepburn, Historical Development of Code Pleading, 1897.

6

Property

Bibliography. The beginner may be referred to the following books, written primarily for students:

Digby, History of the Law of Real Property, 5 ed. 1897.
Williams, Principles of the Law of Personal Property, 17 ed. 1913. (English).
Williams, Principles of the Law of Real Property, 22 ed. 1914. (English).
Schouler, Law of Personal Property, student's ed. 1907.
Tiffany, Law of Real Property, 1903.

A. Nature of Property and Possession.

Bibliography.

Pollock and Wright, Essay on Possession in the Common Law, 1888.

There are three grades in the capacity which men have of influencing the acts of others with respect to corporeal objects.

1. Custody. This is a mere condition of fact, a mere physical holding of or physical control over the thing, without any other element whatever. It is regarded as an element of the next grade (possession). But it may exist entirely independent of law and of the state. The mere having of an object in one's actual grasp gives an advantage dependent on one's own strength, without respect to the law. Interference with custody is an interference with the person of the custodian.

Jural Postulate I.

In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

2. Possession. This is a legal addition to and extension of the idea of custody. Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession, and the law gives to the person so in possession a legal right to continue in possession and be restored to possession should he lose or be deprived of it, as against every one but the owner.

In case of custody, the law secures the relation of the physical person to the object, in order to secure the physical person. In case of possession the law secures the will of the possessor to hold for his own purposes.

3. Ownership. In the highest grade the law goes much further

and secures to men the exclusive or the ultimate enjoyment of objects far beyond their capacity to hold in custody or to possess — beyond what they could hold in their own personal grasp and beyond what they could actually hold even with the help of the state. E.g., one may own ten farms in ten different states.

In case of ownership the law secures the owner's interest of substance — his economic existence.

JURAL POSTULATE II.

In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

B. KINDS OF PROPERTY.

At common law property is of two kinds: real property and personal property. Real property includes freehold estates in land and certain incorporeal property, of which the important forms today are rights annexed to or arising out of land. Personal property includes movables and estates in land less than freehold.

C. TENURE AND ESTATES.

In case of a chattel the owner legally owns the thing itself. In case of land one is supposed to own not the very land, but an estate in the land, by virtue of which he may use and enjoy the land according to the quality of his estate.

ESTATES.

1. Freehold.
 a. Of inheritance.
 i Fee simple.
 ii Fee tail.
 b. Not of inheritance.
 i Conventional — created by act of the parties.
 Estates for life.
 ii By operation of law.
 Curtesy.
 Dower.

2. Less than freehold.
 a. Estates for years.
 b. Estates at will.
 c. Estates by sufferance.

In possession.
Expectancy:
α) reversion
β) remainder

Estates may also be (a) in possession, (b) in remainder, (c) in reversion.

D. Co-ownership.

Estates of any quantity or length of duration, whether in possession or in expectancy may be held at common law in four different ways: (1) in severalty, (2) in joint-tenancy, (3) in coparcenary, (4) in common.

E. Rights in Another's Property.

Scheme of rights in another's property in Anglo-American law:

1. Servitudes.
 a. Profits.
 b. Easements.
 c. Covenants running with the land.
 d. Equitable servitudes.
2. Securities.
 a. Pledge.
 b. Mortgage.
 c. Common-law liens.
 d. Equitable charges or liens.

F. Acquisition of Property.

Scheme of modes of acquisition in Anglo-American law:

1. Original.
 a. Occupation.
 i Abandoned chattels.
 ii Wild animals.
 iii Fruits of land.
 b. Alluvion.
 c. Sale for taxes.
 d. Sale under judgment *in rem* (e.g., for forfeiture under revenue laws).
 e. Adverse possession, prescription.

f. Accession.
g. Confusion.

2. Derivative.
a. Judgment.
b. Marriage.
c. Bankruptcy.
d. Succession.
i Intestate.
ii Testamentary.
e. Gift.
f. Sale.
g. Conveyance.

G. Succession.

At common law the chattels of a deceased owner pass to his personal representative, that is his administrator, appointed by the probate court, if he leaves no will, or his executor, named in his will. His real property passes to his heirs, or since the Statute of Wills (reign of Henry VIII, 1540) to the devisees in his will.

A gift of real property in a will is called a devise; a gift of personal property in a will is called a legacy.

After collection of the debts due the deceased and getting possession of the property of the estate, the personal representative has the duty of (1) paying the debts of the deceased and (2) paying the legacies, if there are sufficient assets after paying debts. Such personal property as remains after payment of debts and legacies is distributed to the next of kin of the deceased according to the Statute of Distributions (reign of Charles II, 1670).

Statutes in the different states provide in detail who are heirs and next of kin, the order in which they shall take and the shares to which they shall be entitled.

Bibliography.

Woerner, The Law of Decedents' Estates Including Wills, 1913.
Gardner, Handbook of the Law of Wills, 1916.

7

Obligations

Obligations is a legal relation between a person or a group of persons and another person or group of persons by which the one is bound to some definite act or forbearance for the benefit of the other.

Jural Postulate III.

In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence

(a) will make good reasonable expectations which their promises or other conduct reasonably create;

(b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;

(c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they recieve what they could not reasonably have expected to receive under the actual circumstances.

Scheme of Obligations in Anglo-American Law:

1. Arising from legal transactions.
 - a. Contracts
 - i Formal — specialties
 - (1) common law
 - (2) mercantile
 - ii Real
 - (1) debt
 - (2) bailment
 - iii Simple
 - b. Express trusts
2. Arising from office or calling.
3. Arising from fiduciary relations.
4. Arising from unjust enrichment.

A. Contracts.

A legal transaction intended to create obligation may create an obligation cognizable and enforceable at law or it may create

one which is only cognizable and enforceable in equity. In the former case we call it a contract.

Contracts are formal, real, or simple. In formal contracts, which are common-law specialties (recognizances — i.e., formal acknowledgments of liability entered into before a court and put upon its record — deeds — i.e., acknowledgments of indebtedness under seal — and covenants — i.e., promises under seal) or mercantile specialties (bills of exchange and promissory notes), the transaction gets its whole legal force from the form in which it is put and the obligation is dependent on and bound up in the formal instrument. If that is lost, resort must be had to equity for relief. Many jurisdictions have abolished private seals and in consequence common-law specialties other than recognizances.

As to the law of negotiable instruments, the student may be referred to Brannan, The Negotiable Instruments Law, 3 ed. 1919.

In real contracts, one who has received something from another is bound from the very fact that he has received something. The obligation may call for the repayment of money loaned (debt) or for the redelivery of a tangible chattel delivered, together with certain duties of good faith as to the care and use of the chattel bailment).

As to the law of bailments, the student may be referred to Dobie, Bailments and Carriers, 1914.

A simple contract is a bargain whereby the parties exchange promises or exchange a promise on one side for an act on the other. The promise or act of the promisee is said to be the consideration of the promisor's promise. It is made up of an offer on the one side — i.e., a tender of a promise in exchange for the other's promise or act, or of an act in exchange for the other's promise — and acceptance — i.e., giving the counter promise or doing the act asked for — on the other side.

Bibliography.

Anson, Principles of the English Law of Contract, 13ed. 1912.

Harriman, The Law of Contract, 2ed. 1901.

Pollock, Principles of Contract, ed. by Wald and Williston, 1906.

B. Trusts.

A person is a trustee when he has legal rights or powers which he is bound in equity to exercise for the benefit of another or for some particular purpose not his own.

Trusts may be created without transfer of title or possession, by declaring oneself trustee for another, or in connection with transfer of title by express provision that the transferee shall hold not beneficially but in trust for a designated beneficiary or for designated purposes.

Trusts are cognizable only in equity.

C. Public Utilities.

The most important of the obligations arising from an office or calling at common law is that which the law attaches to the profession of a public employment — that is, to engaging in certain callings which involve public service. The law imposes on those who engage in such callings duties of serving the public without discrimination, of furnishing reasonable service, and of providing reasonable incidental facilities.

Bibliography.

Wyman, Public Service Corporations, 1911.

D. Fiduciary Relations.

Although there is no express trust, wherever a person is in a position in which another or others repose trust and confidence in him — e.g., an executor, administrator, director of a corporation, agent, medical advisor, husband, wife — equity will not suffer him to take advantage of the situation, but will compel him to adhere to the strictest good faith.

E. Quasi-Contract.

Quasi-contract is a legal obligation, arising without reference to the assent of the person obliged, from the receipt of a benefit which he may not justly retain.

The students may be referred in this connection to Woodward, The Law of Quasi-Contracts, 1913.

8

Torts

Bibliography.

Salmond, The Law of Torts, 3 ed. 1912.
Pollock, The Law of Torts, 9 ed. 1912.
Bigelow, The Law of Torts, 8 ed. 1907.
Burdick, The Law of Torts, 3 ed. 1913.

Corollary of Jural Postulate I.

One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing.

Jural Postulate IV.

In civilized society men must be able to assume that others, when they act affirmatively, will do so with due care with respect to consequences that may reasonably be anticipated.

Jural Postulate V.

In civilized society men must be able to assume that others, who maintain things likely to get out of hand or to escape and do damage, will restrain them or keep them within their proper bounds.

Hence one is liable in tort for

I. Intentional aggression upon the personality or substance of another.

a. Personality —
 i Assault and battery.
 ii Imprisonment.
 iii Infringement of privacy (in dispute).

b. Personality and substance.
 i Infringement of rights in the domestic relations.
 ii Malicious prosecution.
 iii Defamation.
 (1) slander.
 (2) libel.

c. Substance.
 i Trespass upon possession.
 (1) of land.
 (2) of chattels.
 ii Conversion of chattels.
 iii Intentional interference with advantageous relations.
 iv Deceit.

(Unless he can establish justification or privilege, according to the corollary of Postulate I.)

II. Negligent interference with person or property — i.e., failure to come up to the legal standard of due care under the circumstances, while carrying on some affirmative course of conduct, whereby injury is caused to the person or property of another.

III. Unintended non-negligent interference with the person or property of another through failure to restrain or prevent the escape of some dangerous agency which one maintains. Thus one may be liable for:

a. Trespass on another's land by one's animals.
b. Injury to the person of others by
 i wild animals
 ii domestic animals known to have vicious habits.
c. Dangerous uses of land where something maintained upon the land which is likely to escape and do damage upon neighboring land is not kept at home. (In dispute.)






3 2044 018 808

This book should be returned to the Library on or before the last date stamped below.

A fine of five cents a day is incur[r]ining it beyond the specified ti[m]

[r]rn promptly.

THE BORROWER WILL BE CHARGED AN OVERDUE FEE IF THIS BOOK IS NOT RETURNED TO THE LIBRARY ON OR BEFORE THE LAST DATE STAMPED BELOW. NON-RECEIPT OF OVERDUE NOTICES DOES NOT EXEMPT THE BORROWER FROM OVERDUE FEES.



